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RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY. — III.

IN the first article of this series we noticed briefly the development of the primitive superstitious and irrational conception through several stages, in each of which the change in social growth led to discriminations based more and more on rational ideas;[1] but we left this growth at a period — the Norman Conquest — when the primitive notions, by which the responsibility for harm was associated with certain sources, were by no means left behind. Of the subsequent forms of this development in the realm of Agency we have seen something in a second article. It remains to trace the change in the other groups, — a process much more complicated. The groupings there made for convenience —

[1] In addition to the authority of Prof. Dr. Brunner (in the former article) on the nature of primitive Germanic notions, may here be noted a quotation from an article, by M. P.-F. Girard ("Nouvelle Revue Historique," etc., 1888, at p. 38), on the Roman Noxal Actions, in which a similar development in Roman Law is demonstrated: "There is a phenomenon which one can discern throughout all antiquity, — that is, vengeance, the physical, unreasoning emotion, which drives the victim of an injury to a violent reaction against the immediate author of the injury. He who regards himself as offended against, takes vengeance for the offence as he will and as he can, alone or with the help of others, recognizing only the brute fact that he has suffered, and dominated by a feeling of resentment measured solely by the harm he has undergone. . . . The victim of the harm knows nothing but the harm done to him. He does not concern himself with the intent of the doer. . . . He therefore revenges himself for the harm-causing act, even though it may have been unintentional. . . . Moreover, for the same reason, the victim takes his revenge, even where the immediate author of the harm is not capable of intending it, — where it is not a human being, but an animal, or an inanimate object."

harm from (*a*) a personal deed, (*b*) an animal, (*c*) an inanimate thing — must here be abandoned, and the line of tracing must be accommodated to the groupings which are most marked in the precedents of 1300–1800; the effort in hand being always to make out the subjective course of legal thought in its progress towards the accepted standards of to-day. The topics then may be followed down in this order: 1. Personal Deed; 2. Self-defence; 3. Deed of an Infant and of a Lunatic; 4. Keeping of Fire; 5. Keeping of Animals, with reference to (*a*) land trespasses, (*b*) trespasses by biting, etc.; 6. Keeping of Dangerous Things in general.

1. *Personal Deed.* — Here, about the 1200s, the responsibility was still absolute, and irrespective of personal blame in producing the harm. In homicide, at least, the slayer by misadventure forfeited his goods and paid some fine or fee to the king, though his life was spared; while in probably all torts the harm-doer paid some compensation to the injured party. What we have to note is, first, that no distinction as to negligence or the like was yet made; it was either "misadventure," "unwitting," — that is, not intentional, — or wilful, intentional. Secondly, we note that the state of things still corresponded in essence with prevailing ethical notions; the man was getting fair dealing as far as the standards of the time went. Our object must be to discover how and when the notion got away from these tests. The first circumstance we perceive is that the penal law was already getting away from them, as is shown by the sparing of the life; and as the purposes of a penal law became more and more clearly realized, we may suppose that the penal treatment grew less and less rigorous as time passed; though the forfeiture remained in name at least even in Blackstone's time. But a distinction was early made between penal and civil consequences, as the case 6 Edw. IV., *infra,* indicates. This rested probably on the ground, still very properly accepted, that "in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering" (1681, Lambert *v.* Bessey, *infra*). But to-day we do certainly consider, not merely the sufferer's damage, but the blamableness of the defendant's conduct; while no such distinction was yet made, in the 1300s, even in cases of mere "misadventure." We have still therefore to trace the transition in this respect. Now, it has been generally supposed that until the present century (earlier in this

country,[1] later in England[2]) the old notion continued, that the rationalization never proceeded any further than to posit a voluntary act by the defendant; that if from a voluntary act a Trespass — that is, a direct and immediate injury — followed, nothing could save the defendant from civil responsibility.[3] And no doubt this came to be at least the preliminary test, the *sine qua non*, showing itself most prominently in the rule of pleading that if there had been no such voluntary act, then there was not even a *prima facie* Trespass.[4] But more than this the whole course of precedents and of contemporary legal opinion does not allow us to believe. The evidence seems certain that the rationalization towards the line of present standards began at a much earlier period than has been supposed. In other words, there has never been a time, in English law, since (say) the early 1500s, when the defendant in an action for Trespass[5] was not allowed to appeal to some standard of blame or fault in addition to and beyond the mere question of his act having been voluntary; *i. e.* granting a voluntary act, he might still excuse himself[6] (apart from excuses of self-defence, consent, and the like). At first this test, naturally, was vague enough. "Inevitable necessity," "unavoidable accident," "could

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[1] Vincent *v.* Stinehour, Harvey *v.* Dunlop, Brown *v.* Kendall (1835–1850), in Appendix.

[2] Stanley *v.* Powell (1891), in Appendix.

[3] See, for example, the language of Grose, J., in Leame *v.* Bray (Appendix); the argument for the defendant in Holmes *v.* Mather (Appendix); Lord Cranworth, in Fletcher *v.* Rylands, L. R. 3 H. L. 330: "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer;" and 5 Harv. Law Review, 36: "The rule, so well settled in America, that inevitable accident is a good defence to an action of trespass for personal injuries, has not hitherto found entire favor with the English courts. There crept very early into the English law a principle, which the courts have been slow to repudiate, to the effect that he who acts voluntarily acts at his peril, and is responsible for personal injuries to another resulting from his acts, though the injury be the outcome neither of wilful wrong-doing nor of negligence. The few cases in which a defence has been allowed have been decided either upon principles of expediency or upon questions of pleading. . . . The English judges have obstinately refused to adopt squarely the reasoning of the American courts, that where a man uses due care he is not responsible for results which could not have been foreseen, and, while practically arriving at the same results in a number of cases, have based their decisions upon narrow and unsatisfactory grounds." The writer's opinion, originally to this effect, was not changed until the evidence below was laid before him.

[4] Gibbons *v.* Pepper, 1 Ld. R. 38; Knapp *v.* Salsbury, Boss *v.* Litton, Goodman *v.* Taylor, Hall *v.* Fearnley, *infra*, Appendix.

[5] For a qualification as to trespasses to realty and to personalty, see *infra*.

[6] Originally the distinction requiring this to be done by an affirmative plea in justification seems not to have prevailed.

not do otherwise," served indiscriminately to hit off, in judicial language, the reasons of justice on which they equally exempted him who acted in self-defence, and him who had not been to blame for what we now call "negligence," and him who trespassed on the plaintiff's land to avoid a highway attack.[1] The phrases, "non potuit aliter facere" and "inevitable necessity," served as leading catchwords for many centuries;[1] and even up to the 1800s we find court and counsel constantly interchanging "inevitable accident" and "absence of negligence or blame."[2] The precedents show us, then, that somewhere about 1500 a decided sloughing-off of the last stage of the primitive notion took place, and a defendant could exempt himself in this sort of an action if his act, though voluntary, had been without blame; the standard being more indefinite, and perhaps not as liberal, as to-day, but not different in kind. The statements and interpretations of standard contemporary authors may also be noted as pertinent data towards what we are searching for, the estimates of legal responsibility actually prevailing. But it would seem that towards the latter half of this century the opinion at the bar in England misconceived the lan-

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[1] Br. N. B. iii. 229, No. 1216 (A. D. 1236–37), where in a killing in defence he is pardoned, the test being "quia non potuit aliter evadere manus eius;" ib. iii. 107, No. 1084 (A. D. 1225), "aliter enim mortuus esset;" (1319) Y. B. 12 Edw. II. 381, "since the defendant could not otherwise escape;" (1459) 37 H. VI. 37, pl. 26, the defendant trespassed to avoid the attack of the plaintiff on the highway, held justifiable, "because he could not do otherwise than this;" Choke, C. J., in Thorn-cutting case (6 Edw. IV. 7, 18, 1466): "As to what was said about their falling in, *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all that was in his power to keep them out;" see also Catesby, *in arg.*; Britton (Nichols), i. 15, "from necessity to avoid death;" Bacon, Maxims, v., "impossible to do otherwise;" Blackstone, J., in Scott *v.* Shepherd: "Not even menaces from others are sufficient to justify a trespass against a third person . . . nothing but inevitable necessity," citing Weaver *v.* Ward, Dickenson *v.* Watson, Gilbert *v.* Stone; counsel in Gibbons *v.* Pepper, 4 Mod. 405, "for it was no neglect in him, and the mischief done was inevitable;" and the authorities in the Appendix, *passim*.

[2] Buller's Nisi Prius, *infra*, "that it was inevitable, and that he committed no negligence;" Comyn, *infra*, "inevitable and without any neglect;" Espinasse, *infra*, "involuntary and without fault;" Lord Denman, in Boss *v.* Litton, *infra*, "inevitable accident," *i. e.* "one which the defendant could not prevent;" Patteson, J., in Cotterill *v.* Starkey, *infra*, to the same effect; Nelson, C. J., in Harvey *v.* Dunlop, *infra*, "from inevitable accident, or which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against;" Center *v.* Finney, *infra*, "wholly unavoidable and no blame imputable;" Selden, J., in Dygert *v.* Bradley, *infra*, "When we speak of an unavoidable accident, in legal phraseology, . . . all that is meant is that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise;" and other cases *passim*.

guage of some of the earlier cases,[1] and it became necessary to review them in two cases (Holmes *v.* Mather, 1875; Stanley *v.* Powell, 1891), in which the doctrine was finally settled for England that the defendant's attention to the requirements of due care may be (not necessarily always is) a defence, even where a trespass has been done. The same doctrine ("there must be some blame or want of care and prudence to make a man answerable in trespass") had long before been laid down in this country, and that, too, purely as a matter of the right reading of the precedents.[2]

In trespasses to personalty [3] and to realty there had originally been a disposition, at the time the general tendency to mitigation began, to carry it out in this field also. For instance, Rede, C. J., in 21 H. VII. (1506),[4] declared that "where the executors take the goods of a stranger with those of the testator, they are excusable for the taking in trespass," because "one cannot *prima facie* know perfectly which goods belong to the testator and which to the stranger;" and the excused trespass of the oxen in 22 Edw. IV. (1483) 8, 24, seems to rest on a similar notion, while Choke, C. J., shows it clearly in the Thorn-cutting case (1446).[5] But this tendency soon disappeared,[6] probably for reasons of policy, which are still accepted as valid;[7] and no such defence is now admissible, except in trespasses or conversions of personal property under exceptional circumstances.[8]

2. *Self-defence.* — Here, as we have already seen, the Statute of Gloucester (1278) provided that, in crown cases, the slayer in self-defence (though forfeiting his goods) should receive a pardon by the king's favor if he pleased. The earlier cases of this sort are: (1302) Y. B. 30–31 Edw. I. 513 (Rolls ed.); (1338) Y. B. 12

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[1] Probably owing chiefly to the expressions of Grose, J., in Leame *v.* Bray (Appendix). These, taken apart, appeared to support, and perhaps were intended by him to support, the stricter view. The other and later cases show that Lord Ellenborough (also a judge in Leame *v.* Bray) did not hold it.

[2] See Vincent *v.* Stinehour, Harvey *v.* Dunlop, and other American cases in the Appendix.

No doubt the doctrine of "acting at peril" to-day covers the situations involved in some of these cases; for this see the last head in this article.

[3] Including cases where to-day trover would lie.

[4] Quoted in Appendix.

[5] 6 Edw. IV., in Appendix.

[6] Basely *v.* Clarkson, 3 Lev. 37 (1681). But it perhaps lingers in Beckwith *v* Shordike, Appendix.

[7] See Holmes, "The Common Law," 151.

[8] *E. g.* Wellington *v.* Wentworth, 8 Metc. 548.

Edw. III. 533 (Rolls ed.); (1338) Y. B. 21 Edw. III. 17, pl. 22; (1349) Fitzh. Abr., "Corone," 261; (1370) ib., 94, 41 Ass. 21 (1368, appeal of mayhem). Yet the practice as to a pardon varied, for in two of these cases (1302, 1349) the defendant was apparently set free immediately.[1] By 1624 (Dever's Case, Godbolt, 288) the forfeiture was not required. In civil actions of trespass, however, the mitigation was longer in coming. In 1294[2] and in 1319[3] the defendant was obliged to respond; but in 1400,[4] and ever since, the plea is accepted as a complete defence. Yet its whole scope was not fully realized at first. For instance, in the very case preceding that of 1302, in which the defendant was set free for killing a wheat-thief in self-defence, the defendant (in a crown case) who killed a wheat-thief in defence of his brother was sent to prison;[5] and in 1436,[6] when it was agreed that in all justice "it is lawful for a man to aid his master," it seems to be a case of first impression.

3. *Lunatics and Infants.* — The natural result of the primitive notion would be to hold the lunatic liable, no less than the slayer by misfortune; and in fact the two stood at this time on the same footing.

"It was presented that a certain lunatic wounded himself with a knife, and, after he recovered from his infirmity [lunacy] and received the rites of the church, he died of his wounds; his chattels were confiscated" (1315).[7] In 1330 a lunatic homicide is given a king's charter of pardon.[8]

But the popular superstitions in such matters prevented as rapid an approach as might have been expected towards a rational treatment, even in criminal cases, of lunatic harm-doers, as is shown by the condition of prisons and of the legal tests of lunatic responsibility up to the present century. It would seem that a similar inability to make allowances served for a long time as in part a basis for tortious responsibility; though doubtless as much or more influence is to be attributed to the maxim, so powerful in the sphere of deeds and contracts, that "no man of full age shall be, in any plea to be pleaded by him, to be received by the law to stultify himself."[9] However, by Lord Bacon's time, the principle was

1 A pardon was required as late as 1489 (Fitzh. Abr., "Corone," 61).
2 Y. B. 21–22 Edw. I. 586 (Rolls ed.).
3 Y. B. 12 Edw. II. 381 (Rolls ed.).
4 Y. B. 2 H. IV. 8. pl. 40.
5 Y. B. 30–31 Edw. I. 518 (Rolls ed.).
6 14 H. VI. 24, pl. 72.
7 Fitzh. Abr., "Corone," 412 (1315).
8 Ib. 351.
9 Beverley's Case, 4 Co. R. 123 *b* (1603).

maintained in the form that a lunatic was responsible for his torts in the same way as an ordinary person.[1]

The development was quite otherwise with the responsibility of Infants. In Germanic custom the male child was without a standing in the community as an obligor or an obligee. Like the master for the slave, the father answered for and made claims on behalf of the child.[2] The ceremony of investing him with arms as a *wehrhaft*, or weapon-bearing member of the community, was the usual period for the assumption of rights and liabilities; and this customarily (not always) took place at the age of twelve. Hence we find, in Anglo-Norman days, the age of twelve years as the earliest at which liability can begin (and that for boys and girls equally).[3] We soon see, however, a tendency to reduce this age-limit,[4] and the twelve-year rule came to be disregarded in criminal cases;[5] while a seven-year limit appears in later criminal law as the subject of a presumption against criminal intent.[6] The case of 35 H. VI. 11, pl. 18 (1457) is usually given as the first in which an infant was held liable in Trespass.[7] But the language of

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[1] Bacon, Maxims, vii. (1630); Weaver *v.* Ward, Hobart, 134 (1616).

[2] See Brunner, Deutsche Rechtsgeschichte, i. 76; and some references to Anglo-Saxon laws in Hale's Pl. Cr. i. 20 ff. Notice the same notion of legal disability in one of the two forms of the writ of pardon for infants in the Registrum Brevium (309 *b*), where the infant is discharged, but is to come up again and answer, if any one raises the question after he has arrived "ad legitimam ætatem."

[3] Temp. Edw. I. Y. B. 30–31 Edw. I. 529 (Rolls ed.). A boy had set up a mark inside the house, and in shooting, his arrow accidentally went without and killed a woman. Justiciarius: "Since he is not of the age of twelve years he is not a felon, but good and loyal." And as he had absconded, it was publicly proclaimed that he might return if he would.

[4] 1302. Y. B. 30 Edw. I. 511 (Rolls ed.). One who killed in defence of his brother was committed to prison; and it was said that he was under twelve years of age. Spigurnel, J.: "If he had done the deed before his age of seven years he should not suffer judgment; but if he had done any other deed not causing the loss of life or limb, though against the peace, he should not answer, because before that age he is not of the peace." The taking of seven years seems to be a borrowing from the Roman law. See Hale's Pl. Cr. i. 20 ff.

[5] 1338. Y. B. 12 Edw. III. 627 (Rolls ed.): "Itan, a girl of thirteen years, was burnt for that while she was the servant of a [certain] woman she killed her mistress; and [this] was [so] found; therefore adjudged [to be] treason. And it was said that by the old law no one under age was hung, or suffered judgment of life or limb. But Spigurnel found [a case] that an infant of ten years killed his companion and concealed him, and he was hung, since by the concealment he showed that he knew how to distinguish between evil from good. And thus *malitia supplet ætatem*."

[6] Reg. *v.* Smith, 1 Cox Cr. C. 260.

[7] The child was four years of age. The judge says: "Can you find it in your conscience to declare against this child of so tender an age? I think that he did not know

the Court there shows (the penal idea being still at that time attached to the idea of a trespass) a disposition to exempt the infant; and the reason given for refusing to discharge him as incapable of discretion (that the possibility of a plea of justification takes the power from the Court) does not put the case on any ground of the immateriality of intention. Moreover, in 1611 [1] it was resolved by the Court that a writ of *capiatur* would not be issued in an action of *vi et armis* against an infant; and in Temp. Car. I.[2] an action of Case for slander against an infant was sustained on the ground that *malitia supplet ætatem.* However, about this time we find infants ranked with lunatics as liable civilly on the general ground that the intent (*i. e.* bad intent, bad motive) was immaterial.[3]

4. *Keeping of Fire.* — Here the old responsibility, in its strictest form, continued down to Queen Anne's reign, and for almost the whole period, we may believe, as sanctioned by popular notions.[4] The short name of the action ("for negligent garder son feue") is a misleading one; it means merely "for *failing* to keep in his fire," and the responsibility was absolute, as may be seen from the words of the writ [5] (quare . . . homo et femina . . . ignem suum die ac nocte *salvo et secure custodire teneatur, ne pro defectu custodiæ,*" etc.), and from the proceedings in Beaulieu *v.* Finglam (1400),[6] where any question of blamableness is excluded.[7] The primitive

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any malice, for he is not of great strength, and you can see that before your own eyes." Counsel replies that the fact remains that one of his client's eyes is out. Counsel for defence claims that as in felony the Court can dismiss the case if they think his youth shows that he did not know he was doing wrong. But Moyle refuses, because in felony there is only a plea of not guilty, and no justification, and so "the justices have it in their discretion to dismiss him if it appears to them that he is of such an age that he has not discretion; but otherwise in trespass, for in a writ of trespass the party may justify the trespass, and not plead not guilty, and so the justices have no such power." Then a guardian is appointed, and the defendant's counsel is granted an adjournment for a conference.

[1] Holbrooke *v.* Dagley, Cro. Jac. 374.

[2] Hodsman *v.* Grissell, Noy, 129.

[3] Bacon, Maxims, vii.

[4] The same popular attitude seems to have lingered in other countries; *e. g.* in Japan the responsibility for accidental fires continued, in the rural communities, into the present century; and during a recent residence in Tokyo the writer's landlord tried to have inserted in the lease a clause making the tenant responsible for all fires originating within the house.

[5] Rastell, Entries, 8.

[6] 2 H. IV. 18, pl. 6.

[7] The case in 42 Ass. pl. 9 (1369), where the plaintiff lost in an action where the jury found that the fire *fuit suddeinment illumine*, the defendant knowing nothing, is not conclusive to the contrary; for (1) it does not appear that the defendant set the fire;

idea is seen remaining in the argument there made and rejected, that "the fire could not be alleged to be *his* fire, because a man cannot have property in fire."[1] In Tuberville *v* Stamp (1698)[2] the old tradition was still adhered to ("be it by negligence or by misfortune, it is all one"); though the intervention of a sudden wind-storm was treated as an available excuse.[3] In 1700[4] a similar action failed, apparently only by bad pleading; but in 1712 (10 Anne, c. 14, par. 1) the responsibility for accidental fires in houses[5] was abolished by the legislature.[6]

5. *Keeping of animals.* — (*a*) In trespasses of animals by biting or otherwise wounding we find the rule on English soil to be a lineal successor of the form already seen in the North French records,[7] that the owner "did not know the animal's vice." The three writs in the Register[8] begin by alleging that the defendant "quosdam canes ad mordendum oves consuetos apud B. scienter retinuit," "quemdam canem ad mordendos homines consuetum[9] apud L. scienter retinuit," "quemdam aprum ad percutiendum animalia consuetum apud W. scienter retinuit."[10] Sometimes, especially for dogs, we find a modification of the old rule, the same in

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(2) Rolle (Abr. 1, pl. 2) thinks the *vi et armis* spoiled the writ; (3) 2 H. IV., *supra*, is unmistakable. For other cases, see (1450) 28 H. VI. 7, pl. 7; (1582) Anon. Cro. El. 10; and also Rolle's Abr. Act. on Case, (B) Fire.

[1] So, also, in Tuberville *v.* Stamp, "The fire in his field is his fire as well as that in his house."

[2] 1 Salk. 13; Comb. 459; Skinner, 681; Carth. 425.

[3] The doubts there expressed because the fire was started in the field, not in the house, arose hardly from the fact that the tradition dealt only with fire in a house (for the writ does not betray this, nor does Germanic tradition), but from the fact that it was started by a servant, and the old rules about absolute responsibility for deeds done in the house and by the household became the source of confusion.

[4] Allen *v.* Stephenson, 1 Lutw. 36.

[5] Extended by 14 G. III. c. 78, s. 86; 7 & 8 Vict. c. 87, s. 1, to "estates."

[6] Blackstone (i. 131) and Lord Lyndhurst (1 Phill. Ch. Cas. 320) misunderstood "accidentally" to include "negligently" in these statutes. This was corrected by Philliter *v.* Phippard, 11 Q. B. 347 (1847); Bacon, Abr. Case, had the right interpretation.

[7] *Ante*, VII. 327, 328.

[8] Reg. Brev. 110.

[9] The writ reads "mordend*um*" and "consuet*os*," and the terminations should apparently be exchanged.

[10] Compare Selden Soc., Court Baron, 131 (1320): "[The jurors present] that the said John the Swineherd has a dog which ate a rabbit of the lord . . . And that a dog of the Vicar *often chases* hares in the field (fine 3*d.*) . . . And that the dog of John Manimester chased a sow of John Albin, so that he lost her pig, to his damage, taxed at 18*d.*, which the Court awards, etc., and John Manimester is in mercy (6*d.*)." Also p. 52. Here it seems that there was not always an allegation of the *scienter*, or even of the habit, in these lower courts.

idea though somewhat different in form, intimating that liability ensued where the vice and the knowledge could not be shown, if the owner incited the animal to the trespass;[1] *i. e.* the same broad idea, of Command or Assent, as in the case of servants. The rule remained on this basis for several centuries,[2] though the form of the usual writ seems to have changed slightly.[3] By Lord Holt's time it was found desirable to rule that a *scienter* was not necessary in the case of animals "naturally mischievous in their kind;"[4] and his admirably concise statement of the rule has since prevailed, giving Courts nothing to do but apply it to varying circumstances; though even in this apparently simple task they have sometimes found that they had an elephant on their hands.[5]

(*b*) But for land-trespasses of animals the old strict liability continued in full force. Some indications appear of a tendency to impose a greater penalty for trespasses repeated after a first trespass has occurred;[6] but no such relaxation seems to have main-

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[1] Britton (Nichols' ed.) i. 15: "Let it be inquired . . . [if the killing was] by a beast, whether by a dog or other beast, and whether the beast was set on to do it and encouraged to do such mischief, or not, and by whom, and do of all the circumstances." Fitzh. N. B., Trespass, 89, L. "And if a man do incite or procure his dog to bite any man, he shall have an action of trespass for the same;" following a writ for inciting dogs to bite sheep. In 3 Edw. III. 3, 7 (1330), a bill lays the "incitement" of the dogs to bite the sheep. See also 13 H. VII. 15, pl. 10 (1498).

[2] Buxendin *v.* Sharp, 2 Salk. 662 (1697); s. c. Bayntine *v.* Sharp, 1 Lutw. 36; Smith *v.* Pelah, 2 Stra. 1264 (1747). In Millen *v.* Fandrye, the Court seem to have had in mind mainly the land-trespass of the dog (Popham, 161). See *Laws and Liberties of Mass.* (1648), "Sheep" (Whitmore, 191): " . . . If any dog shall kill any sheep, the owner shall either hang such dog or pay double damages for the sheep; and if any dog hath been seen to course or bite sheep before, not being set on, and his owner hath had notice thereof, then he shall both hang his dog and pay for such sheep. . . ." [Re-enacted in General Laws of 1672, s. v.] Probably in England, as here, the claim might always be based either on the habit plus the *scienter*, or merely on an incitement.

[3] "Quod retinuit quemdam canem sciens canem predictum ad mordendum oves, consuetum."

[4] 1700. Mason *v.* Keeling, 12 Mod. 332, Holt, C. J.: "If they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality." The restriction of this rule to "things in which he has no valuable property," and the application of a stricter rule to things in which he has a "valuable property," seems to have been a passing invention of Holt, C. J., in distinguishing the rule as to cattle's trespasses on realty, and has no support in preceding literature. But it may have been inspired, as Mr. Justice Holmes suggests, by the old idea, already noticed, that animals let loose could not bring home responsibility to their former owner. ("The Common Law," 22.)

[5] Filburn *v.* People's Palace Co., L. R. 25 Q. B. D. 258 (1890), where an elephant escaped.

[6] See Laws of Ine, c. 49.

tained itself,[1] and the principle was kept that "a man should so occupy his common that he does no wrong to another man."[2] In modern times, as we shall see, this rule has been rationalized with others under the principle that those who keep things likely to do mischief keep them at their peril.[3] There were but two modifications made. One was the decision, in a solitary case, that in turning the plough on adjoining land (as custom allowed) the owner was not liable for the trespass of the oxen in snatching a mouthful of grass, since "a man cannot at all times govern them as he will;" here the existence of such a custom was held a necessary element in the exemption.[4] The other was the exemption from trespasses of cattle who wander, when driven along the highway lawfully, provided the driver is present and not in fault and makes fresh pursuit.[5] This seems at first to have been granted in cases where the plaintiff was bound by custom to fence along the highway.[6] But in this century this element disappeared, and such a duty now seems to play no part;[7] and an English Court will now go so far as to exempt the driver (barring negligence) on the highway of the bull who breaks into the traditional china-shop,[8] — thus

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[1] Fitzh. N. B., "Trespass," 87 A; Seld. Soc., Manorial Courts, i. 9: "Hugh Tree is in mercy for his beasts caught in the lord's garden. Pledges, Walter of the Hill and William Slipper. Fine, 6*d*." Accord., pp. 7, 10, 12, 13, 15, 18, 37, 90, 183; also 114: "one sow and five small pigs of John William's son entered the court-yard of Bartholomew Sweyn and did damage among the leeks and cabbages. . . . Therefore let John make satisfaction to him for the said 2*d*. and be in mercy for his trespass." These cases date from 1247 to 1294. Add Y. B. 27 Ass. 14, pl. 56 (1354).

[2] Y. B. 20 Edw. IV., pl. 10 (1481); "Doctor and Student," I. 9 (Muchall's ed., 31) (1518): "Every man is bound to make recompense for such hurt as his beasts shall do in the corn or grass of his neighbour, though he know not that they were there;" under the head of things which are doubtful upon the law of reason. Noy, Maxims, c. 44 (1642), borrows the same language.

[3] Blackburn, J., in Fletcher *v.* Rylands, *infra*.

[4] Y. B. 22 Edw. IV. 8, pl. 24 (1483). But compare also 2 Rolle's Abr. 566 (1618): "If a man has a road along my land for his beasts to pass, and the beasts eat the grass in morsels in passing, this is justifiable;" adding, "this is to be understood as done against his will."

[5] Y. B. 10 Edw. IV. 7, pl. 19 (1471); Y. B. 15 H. VII. 17. pl. 13 (1502), *semble;* Fitzh., N. B. 128, notes.

[6] Rastel's Entries, 621, and cases just cited; Dovaston *v.* Payne, 2 H. Bl. 527 (1795). It was always an excuse that the plaintiff was bound, by agreement or by custom, to fence against the defendant; and the modification in question was apparently treated as merely one phase of this, the plaintiff being bound by custom to fence against the highway.

[7] Goodwyn *v.* Cheevely, 28 L. J. Exch. 298.

[8] Tillett *v.* Ward, L. R. 100, B. D. 17 (1882).

bringing true the law laid down by Doddridge, J., in 1605,[1] which, however, was probably not good law in his day.[2] With this history for the rule, it is in appearance strange that it should not have been applied equally to dogs as to other animals. The explanation seems to be that in the Germanic days, from which the traditions come down, the dog was not a domesticated animal, — was only a half-savage hanger-on in the human communities, as he is to-day in many parts of the world. Belonging to nobody, nobody was responsible for him;[3] and by the time man's relation to him could be said as a usual thing to be one of control or possession, the tradition was all against making his owner responsible (barring wilfulness) for his trespasses to land. Such seems to have been the judicial attitude up to this century,[4] and not by any means on grounds of tradition merely; but although Victoria has reached a different result,[5] and although in this country Dog Acts have dealt decisively with the acts of a dog, the law of England on the subject cannot yet be said to be declared.[6]

6. *Sundry Acts; Acts at Peril.* We have now traced down to modern times the doctrines of Responsibility in the typical classes of acts found expressly regulated in the primitive law; and everywhere there has been more or less rationalization of the rules. In some classes (*e. g.* keeping cattle) the duty is made an absolute one for all in similar situations; in others the question of culpability is reopened as to due care in each case on its circumstances; but in all there has come to be assumed some degree of fault sufficient to amount to culpability. There are, however, numbers of acts not falling under the classes above traced; and the question arises, What has been, historically, the canon of Responsibility with

[1] Millen *v.* Fandrye, Poph. 161: "A man is driving cattle through a town, and one of them goes into another man's house, and he follows them, trespass does not lie for this."

[2] Danby and Moyle, JJ., in 10 Edw. IV. 7, pl. 19 (1471).

[3] Trained hunting-dogs and the like were the exception.

[4] Millen *v.* Fandrye, Poph. 161 (1605); Beckwith *v.* Shordike, 4 Burr. 2092 (1767); Brown *v.* Giles, 1 C. & P. 118 (1823).

[5] Doyle *v.* Vance, 6 Vict. L. R. (Law) 87 (1880).

[6] Read *v.* Edwards, 18 C. B. N. S. 260 (1864).

On the general subject, a comparison of the Colonial law is interesting. (1646. *Laws and Liberties of Mass.*, 1660. Tit. "Cattle," Whitmore's ed. 131.) The common-law rule is changed, and the owner of land must fence it against "great cattle;" but the *scienter* analogy is adopted for the new rule; "nor shall any person knowing, or after due notice given, of any beast of his to be unruly in respect of fences, suffer such beast to go . . . without such shackles or fetters as may restrain and prevent trespass." . . . But "for all harms done by goates there shall be double damages allowed."

reference to these? When did the Courts in these cases begin to base an action upon negligence alone, or upon some other test? We are here brought to the subject of the history of the Action on the Case for Negligence, so-called. But this is an inquiry too complex to be here taken up; a summary reference to its probable history must here suffice. Looking, then, at these sundry injuries (other than the above classes) as the Courts of several centuries ago must be imagined to have approached them, we find that they would probably have presented themselves in one of three aspects: (1) There was as early as the 1600s, and probably earlier, a principle that one who did an unlawful act (or one who committed a trespass) was liable for all the consequential damage, when properly alleged as special damage.[1] (2) The principle *sic utere tuo ut alienum non lædas* was early familiar to the judges, and can clearly be traced even where it is given an English garb.[2] This was generally employed to cover the case of an injury caused by acts done on one's own land, but it was sometimes extended to cover the case of injuries by cattle. (3) For harm caused by a mere nonfeasance, including many cases which we now subsume under Negligence, probably no action would lie.[3] The word *negligentia*, as used in earlier times, meant apparently (as has been seen in the action for fire) merely "failure to do" a duty already determined to exist; thus, though the Courts constantly said that "a man is bound to keep his cattle in at his peril," he is sometimes said to be held for "defaut de bon garde," [4] — meaning, not negli-

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[1] 1699: Parkhurst *v.* Foster, 1 Ld. Raym. 479. Trespass against a constable for billeting a dragoon upon him, and forcing him to find meat, drink, etc. The jury found that the dragoon was the one who forced the plaintiff, etc. Holt, C. J.: "At common law, if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act is done with intent that consequential damage shall be done." 1773: Nares, J., and Gould, J., in Scott *v.* Shepherd, 2 Wm. Bl. 893: "Wherever a man does an unlawful act, he is answerable for all the consequences." See also Courtney *v.* Collet, 1 Ld. Raym. 272 (1698); Reynolds *v.* Clarke, 1 Stra. 634 (1722).

[2] Brian, J., in 20 Edw. IV. 10, pl. 10 (1481): "A man should so occupy his common that he does no wrong to another man." Holt, C. J., in Tenant *v.* Goldwin, 2 Ld. Raym. 1089 (1705): "Every man must so use his own as not to do damage to another;" and also in Tuberville *v.* Stamp, 1 Salk. 13 (1698). Gibbs, C. J., in Sutton *v.* Clarke, 6 Taunt. 29 (1815), approves this argument of counsel: "An individual is bound so to restrain the exercise of his rights over his own land that he may not thereby injure his neighbor."

[3] Compare the hesitation in granting assumpsit for a non-feasance.

[4] 27 Ass. 141, pl. 56. See also the action for keeping a ferocious dog, where "pro defectu curæ" is a part of the declaration, as in Mason *v.* Keeling, 12 Mod. 332.

gent keeping, but merely failure to keep as bound; and the misapprehension of this was probably the source of Blackstone's well-known misstatement that the action was for "negligently keeping" his cattle.[1] It seems, then, that the action on the case based on a mere negligent doing was of little or no consequence until the present century,[2] and that it then came about partly through the principle of consequential damage noted above, and partly through the growing application of the test of negligence in Trespass, as already indicated. But this suggestion is merely one made in passing; the essential point to note is that certain of the cases we have studied historically had become, in the present century, amenable to a generic test of Negligence, or Due Care under the Circumstances, which had somehow come to be applied to other cases also. What we have still to notice is the fate of those scattered classes of cases which never became amenable to this test of Due Care under the Circumstances.

Briefly, they wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met, some thirty years ago, by the master-mind of Mr. Justice Blackburn, who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge co-ordinated them all in their true category: —

"There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; . . . the duty is the same, and is to keep them in at his peril."[3]

It is not that the phrase "at peril" was a novel one. On the contrary, it is an indigenous one and a classical one in our law.[4]

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[1] III. Comm. 211. Compare the sense of "negligence" in the precedents in Comyn's Dig., Act. on Case for Negligence.

[2] In Mitchil *v.* Alestree (1677), *e. g.*, the declaration alleged "improvide et absque debita consideratione ineptitudinis loci;" but this allegation plays little part in the decision (2 Lev., 172, alone has it), and the whole case is approached in a very different way from our negligence cases of to-day.

[3] Fletcher *v.* Rylands, L. R. 1 Exch. at 282 (1866).

[4] Littleton, J., in 10 Edw. IV. 7, pl. 19: "It is at the peril of him who drives;" Doctor and Student, ii. 16 (p. 149): "When a man buyeth land or taketh it of the gift of any other, he taketh it at his peril;" ib. ii. 27 (pp. 191, 192); Mitchil *v.* Alestree, in 3 Keb. 650: "Per Curiam: It 's at peril of the owner to take strength enough to order them;" keeping gunpowder; action for nuisance; Holt, C. J., in Anon., 12 Mod. 342:

Nor is it that no previous attempt had been made at such a co-ordination of these kindred instances; for several such attempts, of more or less insight and conviction, may be found.[1] What gave the exposition on this occasion its novelty and its permanent success was the broad scope of the principle announced, the strength of conviction of its expounder, and the clearness of his exposition, and perhaps, too, the fact that the time was ripe for its acceptance.[2] It caught up and reconciled the absolute liabilities already predicated, as well in the two rules just above mentioned (consequential damage of an unlawful act, and "so use your own as not to injure another's") as in the remaining rules for trespasses by acts done "at peril" (keeping cattle, shooting guns under certain circumstances, and others already mentioned); it furnished a general category in which all such rules, whenever formed, could be placed. The full scope of the principle has since not always been perceived in individual instances; and Courts may differ, and have differed, as to whether particular acts (*e. g.* keeping reservoirs) should, in policy, have the principle applied to them.[3] But the practical effect of that great jurist's opinion has been to furnish us with three main categories of acts to which Responsibility is affixed with reference to specific harm, viz. (1) acts done wilfully with

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"It would be at peril of builder;" Nares, J., in Parsons *v.* Loyd, 3 Wils. 346: "Every plaintiff sues out process at his peril." Martin, B., had already phrased the same idea in a little different form: (1856) Blyth *v.* Waterworks Co., 11 Exch. 781, during argument: "I held, in a case tried at Liverpool, in 1853, that if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers; that they were liable for all the consequences," citing Lambert *v.* Bessey; and in Fletcher *v.* Rylands, 3 H. & C. 793 (lower Court), he speaks of "quasi-insurers."

[1] Holt, C. J., in Mason *v.* Keeling, 12 Mod. 332 (1700), and Tenant *v.* Goldwin, 2 Ld. Raym. 1089 (1705); Cockburn, C. J., in Vaughan *v.* T. V. R. Co., 5 H. & N. 679 (1850); and counsel in a few prior cases.

[2] Supplementing Lord Blackburn's judicial utterance, the theoretical exposition of Mr. Justice Holmes, in cc. iii. and iv. of "The Common Law," had served more than anything else to commend and establish the distinction. It has been accepted also by Sir Frederick Pollock, in his "Torts," p. 17 (apparently), and by Mr. Schofield, formerly instructor in Torts in the Harvard Law School, in 1 Harv. Law Rev. at 52.

[3] It is sometimes said, for instance, that Fletcher *v.* Rylands, is "not law" in America or in this or that State. But such statements fail to distinguish between (1) the acceptance of Lord Blackburn's principle above, and (2) its application to the facts in Fletcher *v.* Rylands. The principle is sanctioned, in one way or another, consciously or unconsciously, in every court of the country. But (a) it is not invariably held to control in cases having facts like Fletcher *v.* Rylands; and (b) the tendency may perhaps be said to be in many States to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in Brown *v.* Collins, 53 N. H. 442.

reference to that harm; (2) acts done at peril with reference to that harm; (3) acts done negligently with reference to that harm. We had, at the time of the Conquest, two categories only, — acts wilful and acts of misadventure, — and these scarcely distinguishable civilly. To-day, with the process of rationalization nearly accomplished, we find these transmuted to three, — two of them in scope and conscious significance novel to the past: acting at peril, and acting without due care under the circumstances. It has been the effort in these articles to discover and set forth the processes by which our legal ideas, as living conceptions, passed from the one stage to the other.

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APPENDIX.

THE salient parts are here set forth of the precedents and the leading early treatises bearing on the question of negligence and inevitable accident as an element of Responsibility in Battery, etc. The first two precedents make the connection with those already cited from the 1200s in a preceding article.

1330. *Fitzherbert, Abr. Corone*, 354. — "It was found that a man killed an infant by misadventure while he was rolling along a stone which fell upon the infant, etc.; wherefore the justices remanded him to prison to await the grace of the king;" and the sheriff is ordered not to put him into irons.

1330. *Ib., Corone*, 302. — "It was presented that a man killed another by misadventure, scil., he struck him on the head with an arrow [? *sete*] as he was going to a market, and it was adjudged misadventure, and his chattels were forfeit, the town was charged with the [value of the] chattels, and the town was also fined because it did not arrest him."

1400. *Beaulieu* v. *Finglam*, Y. B. 2 H. IV. 18, 6. — Action for a fire caught from the defendant's fire. Markham, J., puts the case of an accidental fire occurring by the act of a guest or servant: "In this case I shall answer to my neighbor for the damage. . . ." Hull, for defendant: "That will be against all reason to put blame or default in a man where there is none in him; for negligence of his servants cannot be called his feasance." Thirning, C. J.: "If a man kills a man by misfortune, he will forfeit his goods, and he must have his charter of pardon *de grace*. *Ad quod curia concordat.*" [Here the judge, by his answer, clearly implies that the killer suffers in spite of his being quite blameless; and when the counsel protests that his client will be ruined] Thirning, C. J.: "What is that to us? It is better that he should be undone wholly, than that the law should be changed for him." ["Changed," that is, apparently, so

as to take into consideration any question as to the existence of blame on his part.]

1466. *Y. B.* 6 *Edw. IV.* 7, 18. — Trespass ; the defendant cuts thorns on a hedge, and they fell, *ipso invito*, on the plaintiff's land, and he entered to take them. Catesby, for defendant: "Sir, it has been said that if one does an act, though lawful, whereby wrong and damage is done to another against his will, still if he in any way could have avoided it, etc., then he shall be punished therefor, etc. Sir, it seems to me the other way." . . . Fairfax, for plaintiff: "I say there is a diversity between an act resulting in a felony and one resulting in a trespass, for . . . when it was against his will it was not *animo felonico*, but . . . if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito*, . . . he shall have a good action of trespass against him, and yet the shooting was lawful, etc., and the wrong which the other received was against his will." Brian, for the plaintiff, puts the cases of a timber falling, and of a blow by a stick in self-defence against a third party, "*me invito*," to which Littleton, J., agrees. Choke, C. J., also agrees, adding: "As to what was said about their falling *ipso invito*, that is no plea, but he ought to show that he could not act in any other way, or that he did all that was in his power to keep them out, etc." [There is nothing to show that this explanation was not agreed in by the other judge; and in Millen *v.* Fandrye it was taken as the reason of the decision. But this case is the first to make such a qualification.]

1506. *Y. B.* 21 *Henry VII.* 27, 5. — Trespass; the defendant stored the parson's tithes, to save them from the cattle. Rede, C. J.: "Although the defendant's intent [motive] was good, still the intent is not material, though in felony it is; as where one is shooting at butts and kills a man, it is not felony. . . . But when one shooting at butts wounds a man unintentionally, he shall be called a trespasser against his will. And where the executors take the goods of a stranger with those of the testator, they are excusable for the taking in trespass. . . . And in these cases there is reason; for in the first case one cannot *prima facie* know perfectly which goods belong to the testator and which to the stranger. And where one justifies an imprisonment for suspicion of felony, one ought to have good grounds of suspicion. . . . So one ought always to have a good justification." [A clear implication that in his first illustration he regarded the shooter as in some way not without blame.]

1605. *Millen* v. *Fandrye*, Poph. 161. — Trespass for chasing sheep with a dog; Crew, C. J.: "It seems to me that he might drive the sheep out with the dog, and he could not withdraw his dog when he would in an instant; [then citing the thorn-cutting case] . . . and the opinion was that, notwithstanding this justification, trespass lies, because he did not plead that he did his best endeavor to hinder their falling there; yet this was a hard case. But this case was not like to these cases, for here it was lawful to chase them out of his land, and he did his best endeavor to recall the dog. . . ." Doddridge, J., citing the case of cattle trespassing from the highway: "Trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily" [showing their idea of "involuntary"]. Jones, J.: "He cannot recall his dog in an instant." [Here "doing one's best endeavor" seems to be accepted as a general excuse.]

1616. *Weaver* v. *Ward*, Hobart, 134. — Trespass for assault and battery; the defendant pleaded that he and the plaintiff were members of a train-band, and during a skirmish, the defendant, in discharging his piece, *casualiter et per*

infortunium et contra voluntatem suam, wounded the plaintiff, *absque hoc*, etc. Judgment for the defendant. "Felony must be done *animo felonico*, . . . yet in trespass . . . it is not so, . . . and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

1630. *Bac. Maxims, VII.* — "The law doth [in civil trespasses] rather consider the damage of the party wronged, than the malice of him that was the wrong-doer," and so in misadventure, as shooting at butts, "trespass lieth, though it be done against the party's mind and will." [It will be seen that the idea emphasized is the non-necessity of *malice;* the maxim, here and in its after application, was not intended to go so far as to say that the question of due care was immaterial. See the maxim applied to fraudulent knowledge in Haycroft *v.* Creasy, 2 East, at 104.]

1681. *Lambert* v. *Bessey*, T. Raym. 421. — Trespass for false imprisonment; the defendant justified under a bad writ. "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering," citing the thorn-cutting case, Gilbert *v.* Stone, Weaver *v.* Ward, and the Shooting at Butts, Lifting the Staff, and Timber-falling cases. "And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum, nisi mens sit rea.*" [The remarks on Bacon's Maxim, *supra*, apply here. Note that the other three judges exonerated the defendant because he did not know the writ was bad.]

1682. *Dickenson* v. *Watson*, T. Jones, 205. — Trespass for shooting the plaintiff; plea, that while collecting taxes the defendant, intending to discharge his pistol *ne aliquod damnum eveniret*, and *nemine in opposito visu existente*, against his will shot the plaintiff, who casually crossed the path. Held insufficient; "for in trespass the defendant shall not be excused without unavoidable necessity, which is not shown here. Besides, the defendant did not traverse *absque hoc quod aliter seu alio modo*, as was done in the case of Weaver and Ward; and yet judgment there given for the plaintiff."

1700. *Mason* v. *Keeling*, 12 Mod. 332. — Case for injuries by the bite of a ferocious dog. Counsel for defence argues: "The cases of Hobart [Weaver *v.* Ward] and Jones [Dickenson *v.* Watson] are not like this, for everybody knows that a gun charged, if it go off, is apt to do mischief, but not so of a dog."

1716. *Hawkins, Pleas of the Crown, I.*, c. 28, § 27. — "But it seemeth that a man shall not forfeit such recognizance [to keep the peace] by a hurt done to another merely through negligence or mischance; as where one soldier hurts another by discharging a gun in exercise, without sufficient caution; for notwithstanding such person must, in a civil action, give the other satisfaction for the damage occasioned by his want of care, yet he seems not" to have broken the recognizance. [Here culpable want of care is clearly assumed as the basis.]

1724. *Underwood* v. *Hewson*, 1 Stra. 596. — "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at

the trial it was held that the plaintiff might maintain trespass." [The facts being quite compatible with blame in the defendant.]

1760. *Buller's Nisi Prius*, 16 (6th ed.). — Treating of Assault and Battery, "It is no battery . . . if one soldier hurt another in exercise; but if he plead it, he must set forth the circumstances so as to make it appear to the court that it was inevitable, and that he committed no negligence to give occasion to the hurt; for it is not enough to say, that he did it *casualiter et per infortunium, contra voluntatem suam*, for no man shall be excused a trespass, unless it may be justified entirely without his default [citing Underwood v. Hewson] . . . (p. 17). Matter of excuse is an admission of the fact, but saying it was done accidentally, and without any default in the defendant; and that [as I have already said] may be either pleaded or given in evidence on the general issue . . . (p. 25). Every man ought to take reasonable care that he does not injure his neighbor; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action. . . . As in the case mentioned in the third chapter, where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it."

1767. *Beckwith* v. *Shordike*, 4 Burr. 2092; trespass for the killing of a deer with a dog. Ashton, J., citing Millen v. Fandrye, remarked that the court there "held it to be an involuntary [unintentional] trespass, whereas a trespass that may not be justified ought to be done voluntarily . . . [and there] he did his best endeavor to recall the dog. . . . But the present case cannot be considered as an accidental, involuntary trespass." Here Mr. Baron Adams, the trial judge, "had been of the opinion that the jury ought not to have found the defendants guilty, it being an accident that happened without their intention and contrary to their inclination."

1770. *Davis* v. *Saunders*, 2 Chitty, 639. — The defendant's ship drove against the plaintiff's and trespass was brought. The judgment for the defendant did not explain the grounds fully; but Mansfield for the defendant said: "Here the injury was merely accidental. It is true that even if it had been through negligence, it must have been an action of trespass;" and the reporter understood, as the headnote shows, that "accident" was a defence to an action of trespass.

1773. *Scott* v. *Shepherd*, 2 Wm. Bl. 892 (the Squib Case). — Blackstone, J. "In strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis [S. threw to W., W. to R., and R. to the plaintiff] have exceeded the bounds of self-defence and not used sufficient circumspection. . . . The throwing it . . . was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger . . . nothing but inevitable necessity: Weaver *v.* Ward, Dickenson *v.* Watson, Gilbert *v.* Stone." [This citation of these cases here indicates that Blackstone, J., regarded the trespasses in them as founded on "unnecessary and incautious" acts.] De Grey, C. J., says: "Actions of trespass will lie for legal acts when they become trespassers by accident; as in the cases cited of cutting thorns," etc. [This, as it stands, seems colorless.]

1773. De Grey, C. J., in *Barker* v. *Braham*, 3 Wils. 368: "No trespass can be excused but what is inevitable."

1793. *Comyn's Digest* (4th ed.), Battery (A). — "A battery is excused by

inevitable necessity; . . . otherwise if it does not appear to be inevitable and without any neglect in the party," citing Weaver *v.* Ward.

1794. *Ogle* v. *Barnes*, 8 T. R. 188. — Action for negligently steering a ship against the plaintiff's. Lord Kenyon, C. J.: "It is clear that the mind need not concur in the act that occasions injury to another; if the act occasion an immediate injury to another, trespass is the proper remedy." [This almost assumes, certainly does not negative, the existence of blamable conduct in the defendant.]

1797. *Bacon's Abr. Trespass, I.* — "Special Plea: If at the instant a soldier discharges his gun in exercising, a person runs across and is wounded, the defendant cannot plead in justification of the wounding; and if he plead in excuse thereof, all the circumstances must be shown, that the court may judge whether the wounding was owing to want of caution. Weaver *v.* Ward."

Ib. Trespass (D.). — "If one man have received a corporal injury from the voluntary act of another, an action of trespass lies, provided there was a neglect or want of due caution in the person who did the injury, although there were no design to injure;" citing Weaver *v.* Ward, Millen *v.* Fandrye.

1799 (?). *Espinasse, Nisi Prius*, 3d ed., 313. — "'To constitute an assault the injury should be wilful or proceed from want of care; for if not wilful, and done without default, the action will not lie;' Weaver *v.* Ward. As if a soldier at exercise, by accident, hurts his companion, it is not actionable; but it would be otherwise if it proceeded from neglect or want of due care." P. 383: "To constitute a trespass for which this action is maintainable, the act causing the injury must be voluntary, and with some degree of fault; for if done involuntarily, and without fault, no action of trespass *vi et armis* lies. Beckwith *v.* Shordike. . . . And on the same foundation, though the injury has proceeded from mistake, this action lies; for there is some fault from the neglect and want of proper care; and it must have been done voluntarily. Basely *v.* Clarkson." P. 599, of Case: "It is no excuse for a defendant in this action 'that the injury was involuntary on his part, for if any damage is caused to another, from the folly or want of due care and caution in such defendant, this action lies.'"

1800. *McManus* v. *Crickett*, 1 East, at 109. — Lord Kenyon, C. J.: "There is no doubt of the servants in those cases ['the servants of a carman through negligence ran over a boy,' etc.] being liable as trespassers, even though they intended no mischief;" citing Weaver *v.* Ward, Dickenson *v.* Watson. [This shows how the statements about intention being immaterial assume the existence of some negligence or like element of culpability. This explains Lord Ellenborough's language in the next case.]

1803. *Leame* v. *Bray*, 3 East, 593. — Trespass for driving against the plaintiff's chaise. It was claimed that the action should have been Case, the injury being consequential, and "the will not going along with the act." Lord Ellenborough: "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not. . . . Wilfulness is not necessary to constitute trespass." Grose, J.: "Looking into all the cases from the year book in the 21 H. 7 down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass."

1806–8 and 1845. *Selwyn's Nisi Prius*, 1328. — "Although if a person does an injury by an unavoidable accident, an action does not lie, yet if any blame attaches to him, although he be innocent of any intention to injure, . . . then trespass may be maintained."

1808. *Chitty's Pleading*, 128, 129. — "A person may become an immediate trespasser *vi et armis*, even in the performance of a lawful act, if in the course of such performance he be guilty of neglect, as if he hurt another by accident," citing 21 H. VII. and Lambert *v.* Bessey. But "the mind needs not concur in the act that occasions an injury to another, and if the act occasion an immediate injury, trespass is the proper remedy without reference to the intent . . . [citing Weaver *v.* Ward, Underwood *v.* Hewson], and where a person accidentally drives a carriage against that of another, the injury is immediate and trespass is the remedy, though the defendant was no otherwise blamable than in driving on the wrong side of the road on a dark night."

1810. *Milman* v. *Dolwell*, 2 Camp. 378. — Trespass for cutting away a barge which afterwards sank. Lord Ellenborough held that the cutting away (which was admitted) was a trespass, and that under Not Guilty it could not be shown that the barge was frozen to another which could not be removed separately. "If the necessity was inevitable, and the barges of the third person . . . must otherwise have been destroyed, this might have amounted to a justification."

1810. *Knapp* v. *Salsbury*, 2 Camp. 500. — Trespass for driving against the plaintiff's horse. An offer to show under "not guilty" that the collision took place "by mere accident and without any default on the part of the defendant," was held to be appropriate only under a plea of justification. "If what happened arose from inevitable accident" is used by Lord Ellenborough as covering the offer.

1823. *Wakeman* v. *Robinson*, 1 Bing. 213. — Trespass for driving against the defendant's horse. Plea, not guilty. The judge did not direct the jury to consider whether the action was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable. Dallas, C. J.: "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie; . . . but upon the facts of the case . . . I should have directed the jury that the plaintiff was entitled to a verdict, because the accident was clearly occasioned by the default of the defendant. . . . I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground that the jury were not called upon to consider whether the accident was unavoidable or occasioned by the default of the defendant. . . . The learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested to do so;" and so new trial refused. [Note how "unavoidable," here as elsewhere before and afterwards, is loosely taken as synonymous with "not occasioned by defendant's default."]

1832. *Boss* v. *Litton; Goodman* v. *Taylor;* 5 C. & P. 407, 410. — Trespass for injuries received by the defendant's horse and carriage. Lord Denman held that in trespass the only defence, as to the defendant's conduct, could be "inevitable accident," = "one which the defendant could not prevent," following Knapp *v.* Salsbury; but this must be pleaded as a justification.

1834. *Pearcy* v. *Walter*, 6 C. & P. 232. — Trespass for driving against the plaintiff's horse; plea, not guilty. Coleridge, Serjt., for the plaintiff, claimed

that an inquiry into whether there was negligence of the plaintiff or of both, or inevitable accident, could not be gone into under the general issue; implying that it could under a plea of excuse.

1837. In *Cotterill* v. *Starkey*, 8 C. & P. 691, "inevitable accident" in a case similar to Boss *v.* Litton was taken as equivalent to "not the fault of the defendant," and also equivalent to absence of negligence: Patteson, J. (Q. B.).

1842. *Hall* v. *Fearnley*, 3 Q. B. 919. — Trespass for driving a cart and horse against the plaintiff; plea, not guilty. Wightman, J., "told the jury that the question for them was, whether the injury was occasioned by unavoidable accident or by the defendant's default." Lord Denman, C. J.: "A defence admitting that the accident resulted from an act of the defendant would not have been so provable [under the general issue]." Wightman, J.: "The act of the defendant was *prima facie* unjustifiable, and required an excuse to be shown. . . . The omission to plead the defence here deprived the defendant of the benefit of it;" and so a new trial.

1849. *Sharrod* v. *R. Co.*, 4 Exch. at 585. — Parke, B.: "Now the law is well established . . . that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass." [Observe that nothing is said as to possible defences.]

1870. *Smith* v. *R. Co.*, L. R. 6 C. P. 14. — Blackburn, J.: ". . . If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots; which shows that what a person may reasonably anticipate is important in considering whether he has been negligent."

1875. *Holmes* v. *Mather*, L. R. 10 Exch. 261. — Action for driving a carriage and horses against the plaintiff. After a citation in argument of some of the above cases, Bramwell, B.: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were maintainable. That is the effect of the decisions."

1891. *Stanley* v. *Powell*, [1891] 1 Q. B. D. 86. — Action for firing a gun on a shooting excursion and wounding the plaintiff. The jury found that the defendant had not fired negligently; but it was claimed that trespass nevertheless lay. Denman, J.: "This contention was founded on certain *dicta* which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think any can be found, which goes so far as to hold that, if A. is injured by a shot from a gun fired at a bird by B. an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction. . . . [After reviewing many of the cases above] It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of

force committed by the defendant, and therefore an action would lie. I am of the opinion that this is not so. . . . If . . . it is turned into an action of trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action."

American Precedents. — The notable thing here is that three of our best Chief Justices of the last generation had reached the result here indicated as the correct one, and that expressly as a matter of the construction of the English precedents.

1835. *Vincent* v. *Stinehour*, 7 Vermont, 62. — Williams, C. J.: "The principle of law which is laid down by all the writers upon this subject, and which is gathered from and confirmed by the whole series of reported cases, is that no one can be made responsible, in an action of trespass, for consequences where he could not have prevented those consequences by prudence and care. . . . We have examined this case more particularly as the highly respectable and learned counsel for the plaintiff . . . has urged . . . that the doctrines to the contrary found in the elementary writers are only the opinions of the writers, and not founded on adjudged or reported cases. The result of our examination is, that we think there must be some blame or want of care and prudence to make a man answerable in trespass."

1843. *Harvey* v. *Dunlop*, Hill & Den. Suppl. (Lalor) 193. — Trespass for wounding the plaintiff's child: the defendant, a child, had thrown a stone which accidentally struck the other child and put out her eye. Nelson, C. J.: "All the cases concede that an injury arising from inevitable accident, or, which in law and reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility. . . . If not imputable to the neglect of the party by whom it was done, or to his want of caution, an action of trespass does not lie, although the consequences of a voluntary act," citing Bacon's Abr., Weaver *v.* Ward, Gibbons *v.* Pepper.

1850. *Brown* v. *Kendall*, 6 Cush. 292. — Shaw, C. J., after referring to Leame *v.* Bray, etc.: "In these discussions, it is frequently stated by judges that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. . . . We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable," citing Wakeman *v.* Robinson and Davis *v.* Saunders.

See, in accord, Center *v.* Finney, 17 Barb. 94 (1852); Hilliard on Torts, I. c. V., § 9; Greenleaf on Evidence, II., 85; Morris *v.* Platt, 32 Conn. 73 (1865); Dygert *v.* Bradley, 8 Wend. 470 (1832). In Cole *v.* Fisher, 11 Mass. 137 (1814), Castle *v.* Duryea, 2 Keyes, 169 (1865), the contrary attitude may be claimed to exist. In Brown *v.* Collins, 53 N. H. 442 (1873), Doe, J., while appreciating the argument, thinks that Lambert *v.* Bessey is representative of the general trend.